

# INITIAL STATEMENT OF REASONS

## TITLE 2. ARTICLE 25. "HEARINGS"

### SPECIFIC PURPOSE OF THE REGULATION

The specific purpose of these proposed changes is to: clarify the applicability of the regulations to State employees seeking to file appeals on nonmerit issues; incorporate changes which have occurred in statutory and case law which limit the use of some provisions and require conformity to certain provisions of the Administrative Procedures Act (APA) which became effective July 1, 1997; and formalize certain existing procedures for handling appeals and hearings at the Department of Personnel Administration (DPA).

### NECESSITY

The existing regulations set forth at Article 25 were adopted to implement Government Code (GC) Section 19815.4 which establishes DPA's statutory authority to hold hearings regarding issues within its jurisdiction. The regulations were adopted to set forth the manner by which an employee could exercise appeal rights for the following types of nonmerit issues: requests for reinstatement after automatic resignation, appeals from layoff or demotion/transfer in lieu of layoff, protests of involuntary transfer, petitions to set aside resignation, and appeals of denials of a merit salary adjustment, performance appraisal, and denials of sick leave. They are also applicable to appeals from denial of out-of-class claims, pursuant to various court orders.

In 2002, 31% of the appellants represented themselves in their non-merit statutory appeal. Another 67% of the appellants were represented by non-attorney union representatives. Only 2% of the appeals were litigated by attorneys. The existing regulations require supplementation and clarification to provide more definitive guidance to those who are not routinely familiar with litigation procedures and processes and general statutory interpretation.

Following is a section-by-section breakdown of the problem or circumstances each change is intended to address in the California Code of Regulations (CCR).

1. **CCR Section 599.893. Scope of Article.** This section, which was previously "Reserved," is being adopted to identify those parties affected by Article 25. This is necessary to clarify that the hearing provisions apply to State civil service employees appealing nonmerit actions and their appointing authorities.
2. **CCR Section 599.894. Definitions.** The text of this section remains the same. The reference is changed from GC Section 18670 which established the State Personnel Board's (SPB) authority to hold hearings and make investigations regarding civil service matters, to GC Section 19815.4 which established DPA's authority to hold hearings, subpoena witnesses, administer oaths, and conduct investigations concerning all matters relating to its jurisdiction.
3. **CCR Section 599.895. Appeal.** The text of this section remains the same. The reference is changed from GC Section 18670 which established SPB's authority to hold hearings and make investigations regarding civil service matters, to GC Section 19815.4

which established DPA's authority to hold hearings, subpoena witnesses, administer oaths, and conduct investigations concerning all matters relating to its jurisdiction.

4. **CCR Section 599.896. Appellant.** The text of this section remains the same. The reference is changed from GC Section 18670 which established SPB's authority to hold hearings and make investigations regarding civil service matters, to GC Section 19815.4 which established DPA's authority to hold hearings, subpoena witnesses, administer oaths, and conduct investigations concerning all matters relating to its jurisdiction.
5. **CCR Section 599.897. Respondent.** Former CCR Section 599.898 is renumbered as CCR Section 599.897. This is being done to place the definition of "Respondent" immediately following the section which defines "Appellant." There is no change in the text. The reference is changed from GC Section 18670 which established SPB's authority to hold hearings and make investigations regarding civil service matters, to GC Section 19815.4 which established DPA's authority to hold hearings, subpoena witnesses, administer oaths, and conduct investigations concerning all matters relating to its jurisdiction.
6. **CCR Section 599.898. Administrative Adjudication Provision.** The former title ("Respondent") and text of this section have been renumbered as CCR Section 599.897. A new title "Administrative Adjudication Provisions" and new text are adopted as CCR Section 599.898. This text adopts those portions of the APA, effective July 1, 1997, determined to be applicable to DPA hearings. Following is the justification for adopting the specific sections of the APA referenced and for rejecting other sections.

DPA is an agency, which predates the adoption of the APA. It grew out of SPB and for years followed the policies and procedures applicable to SPB with respect to its hearings, except as otherwise provided by statute.

DPA is authorized by GC Section 11400.20 to adopt by regulations the provisions set forth in Chapter 4.5 of the APA. This regulation adopts those portions which have been used over the years by DPA (as an outgrowth of SPB) by practice and policy, but never clearly formalized. It includes the provisions relating to definitions, application, governing procedures, the administrative adjudication bill of rights, ex parte communications, general procedural proceedings, language assistance, informal hearing processes, and enforcement of orders. These portions are set forth at Articles 1, 2, 3, 4, 6, 7, 8, 9 (as limited below), 10, and 12 (as limited below).

This regulation also adopts Article 16 of the APA, dealing with the Administrative Adjudication Code of Ethics. The code is applicable because DPA employs an Administrative Law Judge and pro tem judges who are bound by its provisions, as set forth in Appendix II of the Supreme Court Rule of Courts.

The following provisions of Chapter 4.5 have not been adopted for the reasons set forth below.

Article 5 deals with alternate dispute resolution (ADR). DPA does not engage in ADR and has no need for resolution through ADR.

Article 9 CCR Section 11440.30, which provides for telephonic testimony and testimony by other electronic means, has not been adopted because it requires the agreement of both parties to take testimony by telephone. DPA has always allowed telephonic testimony of physicians at the discretion of the presiding officer. There is a strong need to retain DPA's existing policy to avoid unnecessary costs and delays to State employees seeking reinstatement through DPA.

Article 9 GC Section 11440.50 provides for third-party intervention. DPA's hearings are not of a nature to require intervention, since they involve nonmerit issues between the employer and the employee.

Article 11 provides procedures for serving subpoenas. DPA grew out of SPB. Therefore, its processes for issuing subpoenas have remained consistent in practice and policy with those of SPB. At times, its hearings have been held by SPB Administrative Law Judges. The subpoena authority of SPB and DPA predates the APA and are set forth at GC Sections 18672 through 18674. Those processes do not allow for attorneys to issue subpoenas.

Article 12, dealing with enforcement orders and sanctions, has been adopted but only to the extent that the Director or presiding officer has authority to issue contempt citations. DPA statutes do not provide such broad authority as this article contemplates. Section 11455.30 is not adopted.

Article 13, dealing with emergency decisions, has not been adopted because there is no past practice or policy of this nature and no perceived need for emergency decisions.

Article 14, dealing with declaratory decisions, has not been adopted because there is no past practice or policy of this nature and no perceived need for declaratory decisions.

Article 15, dealing with conversion of proceedings, has not been adopted because there is no past practice or policy of this nature and DPA does not wish to expand the authority of its presiding officer(s) to that effect.

The provisions of Chapter 5 of the APA, effective July 1, 1997, implementing GC Sections 11400 through 11529 have not been adopted by DPA because they relate to formal hearings before the Office of Administrative Hearings and are not applicable to adjudicatory proceedings of agencies created before July 1, 1997. (See Section 11501 Application of Chapter to Agency, GC.)

7. **CCR Section 599.903. Appeal Rights (formerly "Appeal").** The title has been amended from "Appeal" to "Appeal Rights" to avoid confusion with the title of CCR Section 599.895, which defines the term "Appeal." The text has been amended to remove that portion which requires an appeal to be in writing. That requirement has been moved, for clarity, to CCR Section 599.904, which sets forth the time and manner of filing. The reference is changed from GC Section 18670 which established SPB's authority to hold hearings and make investigations regarding civil service matters, to GC Section 19815.4 which established DPA's authority to hold hearings, subpoena

witnesses, administer oaths, and conduct investigations concerning all matters relating to its jurisdiction.

8. **CCR Section 599.904. Time and Manner of Filing (formerly “Time of Filing”).** Both the title and text of this section have been amended. The new title is “Time and Manner of Filing.” The text has been amended to include the requirement formerly in CCR Section 599.903 that the filing be in writing. It also has been amended to advise parties that an appeal must be filed within a specific time frame for DPA to have jurisdiction over the matter and to advise that the date an appeal is mailed to, or received at, DPA (whichever is earlier) is the date on which the appeal is considered filed. The latter provision is intended to remove the confusion parties previously expressed regarding how to determine when the time for filing an appeal expires. Finally, this section has been amended to include an exception which is “except as otherwise limited by statute or case law.” This language refers to ***Bidwell v. DPA*** (1985) 164 Cal.App.3d 213, which makes the 30-day good cause section inapplicable to petitions to set aside resignations. The reference for this section has been amended to add ***Bidwell v. DPA*** (1985) 164 Cal.App.3d 213. The reference also has been amended to add ***Gonzalez v. SPB*** (1977) 76 Cal.App.3d 364. That case defines the term “good cause” as used in this regulation. Otherwise, the regulation has been broken down into subparts for clarity.
9. **CCR Section 599.905. Answer.** The text of this section remains the same. The reference is changed from GC Section 18670 which established SPB’s authority to hold hearings and make investigations regarding civil service matters, to GC Section 19815.4 which established DPA’s authority to hold hearings, subpoena witnesses, administer oaths, and conduct investigations concerning all matters relating to its jurisdiction.
10. **CCR Section 599.906. Hearings and Decisions.** The title and text of former CCR Section 599.906 (Dismissal of Appeals Not Brought to Hearing) have been renumbered as CCR Section 599.908. A new CCR Section 599.906 titled “Hearings and Decisions” is adopted. The new section identifies the types of appeals handled by DPA. They are as follows: appeals for reinstatement after automatic resignation, layoff, demotion/transfer in lieu of layoff, involuntary transfer, to set aside resignations, denials of merit salary adjustments, performance appraisals, denial of sick leave, and denial of out-of-class claims. The text also identifies the delegation of authority by the Director to a presiding officer for hearing and the continuing applicability of existing GC Sections 18672 through 18674 regarding subpoenas. (These sections have been applicable to DPA hearings since before SPB and DPA split jurisdiction with the creation of DPA.) The reference has been changed, as indicated above. The reference has also been amended to add specific reference to each type of appeal allowed by statute and case law.
11. **CCR Section 599.907. Rehearing.** A new section entitled “Rehearing” is adopted. The text sets forth the existing policy of DPA regarding requests for rehearing. In 1995, DPA adopted CCR Section 599.859, which formalized the policy regarding requests for rehearing of excluded employees. Although the policy has always been applicable to rank-and-file employees as well, it has never been formalized in the rule. Its inclusion is intended to clarify for rank-and-file employees that they have the same right to rehearing as excluded employees. The regulation is consistent with existing CCR Section 599.910, which allows 30 days for a “proper application for rehearing” and with CCR Section 599.859 regarding the time frames for response and granting of appeals.

12. **CCR Section 599.908. Dismissal of Appeals Not Brought to Hearing.** Former CCR Section 599.906 is renumbered as CCR Section 599.908. This is being done to allow a “Hearings and Decisions” section to be adopted as CCR Section 599.906, providing internal consistency with other rules. The section is also being amended to delete an expired provision which allowed a three year grace period when the original regulation was adopted. The reference is changed from GC Section 18670 which established SPB’s authority to hold hearings and make investigations regarding civil service matters, to GC Section 19815.4 which established DPA’s authority to hold hearings, subpoena witnesses, administer oaths, and conduct investigations concerning all matters relating to its jurisdiction.
13. **CCR Section 599.909. (Reserved).**
14. **CCR Section 599.910. Decision Becomes Final When.** The text of this section remains the same. The reference is changed from GC Section 18670 which established SPB’s authority to hold hearings and make investigations regarding civil service matters, to GC Section 19815.4 which established DPA’s authority to hold hearings, subpoena witnesses, administer oaths, and conduct investigations concerning all matters relating to its jurisdiction.